no mitigating circumstances to weigh against the remaining three aggravating factors. See *Sochor*, 504 U.S. at 530. In Herring's case, two mitigating circumstances weighed against three remaining aggravators, thus making the case for vacating the sentence even stronger in *Herring* than in *Sochor*.

Given that the opinions of the Florida Supreme Court in *Sochor* and *Herring* are substantively identical, it is clear that by this Court's standard the Florida Supreme Court violated Ted Herring's rights under the Eighth and Fourteenth Amendments when it affirmed his death sentence with only a perfunctory harmless error analysis.

B. The Eleventh Circuit Improperly Denied Herring's *Clemons* Claim Based On Erroneous Applications Of Two Procedural Rules

The Eleventh Circuit refused to conduct federal habeas review of Herring's meritorious *Clemons* claim on two alternative grounds. First, the Eleventh Circuit held that because Herring did not address the district court's determination that his *Clemons* claim was procedurally barred in his initial brief, the issue was not properly before the court. *Herring* v. *Florida*, 397 F.3d 1338, 1342 (11th Cir. 2005). Second, the Eleventh Circuit upheld the district court's determination that habeas review of Herring's *Clemons* claim was procedurally barred because Herring did not properly raise the claim in state court. *Id.* at 1344. Both of these holdings rest on erroneous and hyper-technical interpretation of the respective procedural rules.

1. The Eleventh Circuit Erred in Denying Herring's Clemons *Claim On the Ground That He Did Not Address The Procedural Bar Issue In His Initial Appellate Brief.*

The Eleventh Circuit's primary ground for denying Herring's *Clemons* claim was that "arguments raised for the first

time in a reply brief are not properly before a reviewing court." *Id.* at 1353 (quoting *U.S.* v. *Coy*, 19 F.3d 629, 632 n.7 (11th Cir. 1994)).

The Eleventh Circuit misinterpreted the precedent it cited for this proposition. In *Coy*, the Eleventh Circuit denied an appellant's argument when it was raised for the first time in his reply brief. 19 F.3d at 632 n.7. The distinction between *Coy* and *Herring*, however, is that in *Coy* the argument had in fact only been made for the first time in the appellant's reply brief. The Appellant had not asserted the argument in proceedings below, as was the case here. Here the issue of procedural bar was fully presented to and considered by the district court. The State raised the procedural bar issue in its appellate brief, Herring responded in the reply brief, and the Eleventh Circuit accepted a further letter-brief from the State following the oral argument and invited Herring to submit a letter-brief.[4]

This Court has held that a reviewing court "may consider any issue 'antecedent to ... and ultimately dispositive of' the dispute before it, even an issue the parties failed to identify and brief." *U.S. Nat'l Bank* v. *Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 447 (1993) (quoting *Arcadia* v. *Ohio Power Co.*, 498 U.S. 73, 77 (1990)). Herring's initial brief was

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[4] The Eleventh Circuit invited Herring to submit a letter brief on the procedural bar issue by order entered March 12, 2004. In its opinion, the Eleventh Circuit dismissed the arguments raised in the letter brief with the following footnote: "For the first time, in a supplemental letter brief, Herring asserts additional procedural bar arguments. 'Parties cannot properly raise new issues at supplemental briefing.'" *Herring*, 397 F.3d at 1344 n. 4 (citation omitted). That the Eleventh Circuit could purport to disregard arguments presented in Herring's letter brief, when it invited the filing of such brief by its own order, is incomprehensible.

predicated on the threshold issue that his *Clemons* claim was not defaulted.

Herring's argument that the district court erred in ruling that his *Clemons* claim was procedurally barred was not "made for the first time in [his] reply brief"; rather, it was made for the first time before the district court when the district court so ruled. *Coy* does not address such circumstances, and the Eleventh Circuit cited no authority overruling this Court's holding in *U.S. Nat'l Bank*.

Thus, the Eleventh Circuit erred in denying Herring habeas review of his *Clemons* claim on the ground that Herring did not address in his initial brief the district court's ruling that his *Clemons* claim was procedurally barred.

2. *The Eleventh Circuit's Holding that Herring's* Clemons *Claim is Procedurally Barred is Without Merit.*

As an alternative ground for denying Herring's *Clemons* claim, the Eleventh Circuit affirmed the district court's ruling that Herring did not preserve the claim he made on habeas review by first asserting that claim before the state courts. *Herring*, 397 F.3d at 1344.

Herring asserted his *Clemons* claim at the earliest possible time: when the Florida Supreme Court violated *Clemons* by affirming Herring's death sentence without conducting an adequate harmless error analysis. In his motion for a rehearing Herring asserted that the Florida Supreme Court committed constitutional error in affirming his death sentence and cited *Clemons*. *Id.* at 1343. In holding Herring's *Clemons* claim procedurally barred, the Eleventh Circuit focused on the fact that Herring's argument in his habeas petition with respect to his *Clemons* claim was different from the argument he made in his motion for a rehearing:

> Importantly, although Herring challenged the court's finding of harmless error, he did not assert

> the court *failed to engage in* harmless error analysis. Indeed, Herring asserted the Florida Supreme Court had engaged in harmless error review, but argued the court erred in its finding of harmlessness.

Id. at 1344.

The Eleventh Circuit's finding of procedural default of Herring's *Clemons* claim confuses the difference between preserving a claim and asserting an argument in support of that claim, a difference recognized by this Court in *Yee* v. *City of Escondido*, 503 U.S. 519 (1992). In *Yee*, this Court stated, "Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Id.* at 534. This court further held that "[h]aving raised a taking claim in the state courts ... petitioners could have formulated any argument they liked in support of that claim." *Id* at 535.

The arguments in Herring's motion for a rehearing and his habeas petition are asserted in support of a single claim: that his rights under the Eighth and Fourteenth Amendments, as construed by this Court in *Clemons* v. *Mississippi*, were violated. Because Herring properly preserved his *Clemons* claim by stating it at the earliest possible opportunity, in his motion for a rehearing before the Florida Supreme Court, it was error for the Eleventh Circuit to deem Herring's *Clemons* claim procedurally barred. See *Yee*, 503 U.S. at 535.

As former federal prosecutors/judges, we appreciate that in the interest of judicial economy it is important that procedural rules be applied and heeded with rigor. At the same time, we believe it is deplorable, in a capital proceeding, to deny habeas review of a meritorious federal claim based on an erroneous interpretation and application of procedural default rules. It is incumbent upon federal courts, when reviewing habeas petitions in capital cases, to ensure that the defendant has a legitimate opportunity to present his federal

claims to the federal judiciary. Federal courts must exercise an especially high degree of scrutiny when interpreting procedural default rules during habeas review of capital proceedings to ensure that those rules are not improperly invoked to deny meritorious federal claims. The finality of the death penalty demands nothing less.

II. HERRING WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL DURING THE SENTENCING PHASE OF HIS TRIAL

> [W]e believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.
>
> This conclusion rests squarely on the predicate that the death penalty is qualitatively different from a sentence of imprisonment, however long.... Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

Woodson v. *North Carolina*, 428 U.S. 280, 304-305 (1976) (internal citations omitted).

The death penalty is unique in its finality. It is essential to any principled legal system that if the death penalty is to be imposed at all, it must be administered reliably on an individualized basis, see *id.* at 305, and in a manner that is neither arbitrary nor capricious, see *Gregg* v. *Georgia*, 428 U.S. 153, 188 (1976). A fundamental goal of any death penalty system must be to separate those cases where the death penalty is morally appropriate from those where it is not. See *Woodson*, 428 U.S. at 304-305. Realization of this goal re-

quires that the judge or jury, during the sentencing phase of a capital proceeding, possess the fullest information possible pertaining to the defendant's life history and personal characteristics. *Lockett* v. *Ohio*, 438 U.S. 586, 602 (1978) (citing *Williams* v. *New York*, 337 U.S. 241, 247 (1949)).

In *Strickland* v. *Washington*, 466 U.S. 668 (1984), this Court analogized the sentencing phase of a capital proceeding to the guilt phase of a criminal trial. *Id.* at 686-87. Speaking for the Court, Justice O'Connor stated that, like a trial, the capital sentencing phase should follow an adversarial format, there should be standards for decision, and counsel's role in the proceeding should be comparable to counsel's role at trial—*i.e.*, counsel must "...ensure that the adversarial testing process works to produce a just result under the standards governing decision."[5] *Id.* at 687. Defense counsel therefore has a duty during sentencing to make reasonable investigations to discover all available mitigating evidence. See *id.* at 690-91; *Williams* v. *Taylor*, 529 U.S. 362, 396 (2000); *Wiggins* v. *Smith*, 539 U.S. 510, 533-34

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[5] As one scholar has observed,

> As an advocate ... defense counsel has the ... distinct function of attempting to persuade the jury to exercise mercy. Defense counsel therefore has both the opportunity and the duty to present potentially beneficial mitigating evidence and to attempt to convince the sentencer that, notwithstanding the defendant's guilt, he or she is a person who should not die. Once the defendant has been found guilty of a capital crime, a life sentence is counsel's only remaining advocacy goal. As an advocate for life, counsel must attempt to demonstrate that mitigating factors outweigh aggravating factors and must present the sentencer with the most persuasive possible case for mercy.

Gary Goodpaster, *The Trial For Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 318 (1983).

(2003) *Rompilla* v. *Beard*, 125 S. Ct. 2456, 2466 (2005) ("It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction.").

Indeed, strategic choices to discontinue an investigation into potential mitigating evidence are reasonable only "to the extent that reasonable professional judgments support limitations on investigation."[6] *Strickland*, 466 U.S. at 690-91. When counsel's investigation or presentation of mitigating evidence fall short of "an objective standard of reasonableness," so as to render counsel's representation ineffective, the defendant has been deprived of the right to counsel guaranteed him by the Sixth Amendment. See *id.* at 687-88.

In *Williams* v. *Taylor*, trial counsel "failed to conduct an investigation that would have uncovered extensive records graphically describing [the defendant's] nightmarish childhood," 529 U.S. at 395-96, as well as "evidence that [the defendant] was 'borderline mentally retarded.'" *Id.* at 363. This Court held that trial counsel's failure to investigate could not be justified as tactical and "clearly demonstrate[d] that trial counsel did not fulfill their *obligation to conduct a thorough investigation* of the defendant's background." *Id.* at 396 (emphasis added). Similarly, in *Wiggins* v. *Smith*, where counsel were aware of some aspects of the defendant's background, but elected to "limit the scope of their investigation into potential mitigating evidence," 539 U.S. at 521, this

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[6] The American Bar Association (ABA) has recognized that at no time is the thoroughness of defense counsel's investigation into a client's background more critical than in preparation for the penalty phase of a capital case. *See* GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES § 10.7 (rev. ed. 2003) ("This duty is intensified... by the unique nature of the death penalty[.]").

Court held that "counsel's investigation into [the defendant's] background did not reflect reasonable professional judgment" and that their performance during sentencing "suggest that their incomplete investigation was the result of inattention, not reasoned strategic judgment." *Id.* at 534.

Quarles' performance during Herring's sentencing fell far short of this Court's standard established by *Williams* and *Wiggins*, and recently reaffirmed in *Rompilla*. The only effort Quarles made to present a mitigating case was to call Herring's mother to the stand, whose testimony filled a meager four pages of transcript. (Ex. 193 at 789.). This decision was made despite the fact that Quarles had in his possession hospital records stating that Herring had signs of "brain dysfunction," "neurological dysfunction," "psychoneurotic disorder," and that he was "undoubtedly functionally retarded." (Ex. 194). These reports also reflect that Herring was emotionally disturbed, unable to function in school, and deprived of emotional support at home. Quarles made no attempt to follow up on these records and reports. Nor did Quarles make an effort to obtain the testimony of a mental health expert to explain to the jury the significance of Herring's mental retardation and brain damage.[7] As an additional consequence of Quarles' failure to investigate, he did not dis-

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[7] The Eleventh Circuit claims that Quarles did investigate Herring's mental condition when he had Herring evaluated by Dr. William Friedenberg, a clinical psychologist. *Herring*, 397 F.3d at 1348. Importantly, Quarles only sought Dr. Friedenberg's assistance to determine whether Herring was competent to stand trial or insane at the time of the offense. Friedenberg was never asked to help prepare for the sentencing phase of the trial. Nor was he consulted on any issue of mitigation. As the Eleventh Circuit itself recognized in *Hardwick* v. *Crosby*, competence to stand trial and sanity at the time of the homicide are guilt-innocence phase issues that do not bear on mitigating circumstances relevant to sentencing. 320 F.3d 1127, 1157 (11th Cir. 2003).

cover a report regarding Herring's full scale I.Q. score of 72, a result consistent with mild mental retardation. (Ex. 195.)[8]

Nor did Quarles conduct any investigation into Herring's background in order to locate witnesses willing to testify about Herring's positive character traits. A reasonable investigation would have revealed a teacher, a child care worker, relatives, and a neighbor of Herring who all knew him well and were willing and ready to testify on his behalf. (Affs. James Breen, Juan Ortega, Gwendolyn Myers, Julia White, and Joan Swillings, attached as exhibits to the first Rule 3.850 motion, dated April 2, 1985).[9] Yet Quarles made no effort to seek out these witnesses.

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[8] Stephen Bright has documented several cases where defense counsel's failure to present available mitigating evidence pertaining to the defendant's intellectual capacity was demonstrated, upon remand for a new trial, to have likely been determinative in the sentencer's decision in the first trial to impose a death sentence. In each of these cases, the defendant received a death sentence in the first trial and then appealed on ineffective assistance of counsel grounds. When evidence of the defendant's mental condition was presented in the new trial, the death sentence was not imposed. *See* Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1837 (1994) (referring to *Holloway* v. *State*, 361 S.E.2d 794, 796 (Ga. 1987), *Smith* v. *Zant*, 887 F.2d 1407 (11th Cir. 1989), and *Thomas* v. *Kemp*, 796 F.2d 1322, 1324 (11th Cir. 1986)).

[9] A former teacher of Herring would have testified that Herring was a non-violent, non-aggressive, and vulnerable boy. (Aff. James Breen (Ex. 48)). A former child-care worker who took care of Herring while he was treated at a special facility for emotionally disturbed boys would have described Herring's efforts to improve despite his learning disabilities. (Aff. Juan Ortega (Ex. 49)). Herring's younger sister would have testified that Herring protected her and cared for her while their mother was in the hospital, and that they attended church together, and that Herring sang in the

Quarles thus failed to fulfill his "obligation to conduct a thorough investigation of [Herring's] background." See *Williams*, 529 U.S. at 396. Given the ease with which Herring's appellate counsel was able to collect substantial and significant mitigating evidence, it is clear that Quarles' investigation into mitigating evidence fell far short of an "objective standard of reasonableness." See *Strickland*, 466 U.S. at 687-688. Although it is permissible for counsel to determine that further investigation of mitigating evidence would not be fruitful, this is true only "...to the extent that reasonable professional judgments support limitations on investigation." No such rationale existed here. Quarles did not claim he conducted a thorough investigation and made a strategic decision not to offer more evidence in mitigation. Quite to the contrary, Quarles, who had never tried a capital case before, admitted that he was responsible for investigating the mitigating and aggravating circumstances in Herring's case and that he did "a lousy job." (Ex. 149 at 556-67.)

The jurisprudence of this Court establishes a capital defendant's constitutional right to individualized sentencing. See *Woodson*, 428 U.S. at 304-305; *Lockett*, 438 U.S. at 604; *Williams*, 529 U.S. at 363; *Wiggins*, 539 U.S. at 521. In asserting that right, the defendant depends on his counsel's diligence in investigating and presenting mitigating evidence. When defense counsel neglects his obligation to present the strongest possible mitigating case on behalf of his client, as was the case here, he leaves his client's fate to be determined by a sentencer who lacks adequate information to make such

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choir and was an usher. (Aff. Gwendolyn Myers (Ex. 50)). Herring's godmother would have described the very difficult environment in which Herring grew up and his affectionate personality. (Aff. Julia White (Ex. 51)). A neighbor, a registered nurse, would have supported his family's description of Herring's affectionate personality, and that Herring performed volunteer work for her. (Aff. Joan Swillings (Ex. 52).

a determination.[10] When such neglect is overlooked by the courts, the imposition of the death penalty will not be imposed reliably on an individualized basis, but rather arbitrarily and capriciously, which this Court has held unconstitutional. See *Gregg*, 428 U.S. at 188.

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[10] Professor Goodpaster explains that defense counsel's failure to present available mitigating evidence will also have implications for subsequent proceedings:

> By presenting all available mitigating evidence, defense counsel also enables appellate courts (and the trial court, for jury-imposed sentences) to exercise meaningful proportionality review. Obviously, such review can promote similar results in similar cases only if the essential aggravating and mitigating facts in capital cases can be examined and compared. By failing to develop and present a mitigating case, counsel may preclude judicial consideration and review of factors relevant to determining whether a particular death sentence is disproportionate.

Gary Goodpaster, *The Trial For Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 318 (1983).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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